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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE DANA M. SABRAW)

UNITED STATES OF AMERICA, Plaintiff, v. **EDUARDO GUERRERO**, **ET AL.** Defendant.	CASE NO.: 08CR1362-DMS-01 DATE: August 15, 2008 TIME: 11:00 a.m. STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS

I.

STATEMENT OF FACTS[1]

On April 15, 2008, San Diego Sector North County Smuggling Interdiction Group Agent Terry Shigg was performing anti-smuggling patrol in Oceanside, California. At 12:15 p.m., Agent Shigg noticed a green 1998 Mercury Mountaineer, a common sport utility vehicle, driving northbound on Interstate 5 near Las Plugas Road, in between Oceanside and San Clemente. Agent Shigg noticed that the car was driving at 65 miles per hour, which is the posted speed limit on Interstate 5.

According to Agent Shigg, he noticed the car "appeared to be heavily loaded" although he saw only

[1]. All of the facts are taken from the Report of Investigation (hereinafter "ROI"), pages 1 through 3 of which are attached to this motion as Exhibit A. Mr. Guerrero contends that if this Court were to believe all of the facts recited by the agents in the Report of Investigation, his arrest would be invalid under the 4th Amendment. Therefore, Mr. Guerrero has not provided the Court with his own sworn declaration as is required by Local Criminal Rule 47.1(g). However, Mr. Guerrero can provide a declaration for the Court if ordered to do so.

two passengers visible. He continued to follow the car and near the San Clemente Border Patrol Checkpoint, he drove next to the Mountaineer and then observed two rear passengers ducked down below the windows of the vehicle. Based solely on his observation that the car appeared to be weighted down and that there were two people ducking, Agent Shigg believed that the car was attempting to smuggle illegal aliens in the United States. According to the ROI, Agent Shigg did not believe the car was speeding or driving in an evasive, unsafe or suspicious manner. See Exhibit A.

Agent Shigg activated his emergency lights and siren and initiated a traffic stop of the car. The Mountaineer complied with the agent's request to stop and pulled over to the left shoulder. Once Agent Shigg approached the car he made contact with the driver, the defendant Mr. Guerrero, and the individual in the front passenger seat, co-defendant Michael Romero. Once he approached the car, Agent Shigg noticed four individuals in the backseat, attempting to conceal themselves and not wearing their seatbelts. Agent Shigg also noticed two individuals laying down in the back of the car, in the rear cargo area, without seatbelts on. After asking several questions of the passengers, he determined that the six individuals in the back seat and rear cargo area did not have proper documentation to enter or remain in the United States. Agent Shigg placed Mr. Guerrero and Mr. Romero under arrest and took the remaining passengers into custody. See Exhibit A.

On April 30, 2008, a three count indictment was handed down by the January 2007 Grand Jury charging Mr. Guerrero with three counts of transportation of illegal aliens and aiding and abetting, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii) and (v)(II). Mr. Guerrero has entered a not guilty plea to the charges.

II.

ALL EVIDENCE SEIZED AS A RESULT OF THE ILLEGAL STOP MUST BE SUPPRESSED

A. The Fourth Amendment Requires a Traffic Stop Be Supported By A Reasonable Suspicion of Criminal Activity.

The Fourth Amendment protects the "right of people to be secure in their persons, houses papers, and effects, against unreasonable searches and seizures." U.S. Constitution Amend. IV. The Fourth Amendment specifically prohibits unreasonable searches and seizures of a vehicle during brief investigatory stops. See United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). An officer may detain a motorist only upon a demonstration of "reasonable suspicion" of criminal activity. See United States v. Cortez, 449 U.S. 411, 417 (1981); see also United States v. Rodriguez, 976 F.2d 592, 594 (9th Cir. 1992), amended 997 F.2d 1306 (9th Cir. 1993) (stating that an officer may not detain a motorist without a showing of a "particularized and objective basis for suspecting the particular person stopped of criminal activity" (quoting Cortez, 449 U.S. at 417-18)).

The government bears the burden of establishing that the totality of the circumstances attendant to the immigration stop gave the agents reasonable suspicion that criminal activity was afoot. United States v. Sigmond-Ballesteros, 285 F.3d 1117, 1121 (9th Cir. 2002). In determining whether there was reasonable suspicion the Court "must look at the 'totality of the circumstances' of the case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing.'" Id. (quoting United States v. Arvizu, 534 U.S. 266 (2002)). "[R]easonable suspicion may not be 'based on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped.'" Sigmond-Ballesteros, 285 F.3d at 1121. (quoting United States v. Rodriguez-Sanchez, 23 F.3d 1488, 1492 (9th Cir. 1994), overruled in part on other grounds by United States v. Montero-Camargo, 208 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc), cert. denied sub nom. Sanchez-Guillen v. United States, 531 U.S. 889 (2000).

A determination of whether an officer had "reasonable suspicion" of wrongdoing is "'not readily, or even usefully, reduced to a neat set of legal rules.'" Ornelas v. United States, 517 U.S. 690, 695-96 (1996) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)); see also United States v. Hernandez-Alvarado, 891 F.2d 1414, 1416 (9th Cir. 1989). Rather, in making reasonable-suspicion determinations, the court must consider the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting criminal activity. United States v. Cotrez, 449 U.S. 411, 418 (1981); see also United States v. Arvizu, 534 US. 266 (2002) (holding that the "totality of the circumstances" inquiry of an investigatory stop of a vehicle must be based on all factors, collectively, and not each in isolation). While this inquiry "includes the 'collective knowledge of the officers involved, and inferences reached by experienced, trained officers,'" Hall, 974 F.2d at 1204 (other internal quotations omitted), this experience may *not* be used to give the officers unbridled discretion in making a stop. See Hernandez-Alvarado, 891 F.2d at 1416; see also Florida v. J.L., 529 U.S. 266, 271 (2000) (finding a tip from an anonymous informant did not give rise to sufficient reasonable suspicion to perform a Terry stop).

B. There Was No Reasonable Suspicion Of Criminal Activity And Therefore The Traffic Stop Violated The Fourth Amendment.

Looking at the facts Agent Shigg relied on in stopping Mr. Guerrero's car, it is clear that he lacked a reasonable suspicion of criminal activity necessary to stop the car. It should be first noted that Agent Shigg only relied on two facts in deciding to pull Mr. Guerrero's car over: (1) that the car appeared to be heavily loaded; and (2) he observed two individuals ducked down below the windows. Based solely on these observations, he decided to initiate a traffic stop of Mr. Guerrero. Agent Shigg's observations of four individuals ducking in the backseat as well as the observation of the two individuals laying down in the rear cargo area of the vehicle cannot be considered in determining whether reasonable articulable suspicion of criminal activity existed at the time of the traffic stop because Agent Shigg's noticed these facts only *after* he had stopped the Mountaineer. Therefore, the two facts observed by Agent Shigg before initiating the traffic stop - that the car was heavily loaded and two individuals were ducking below the windows - are the only facts this Court can use in determining whether reasonable suspicion of criminal activity existed to initiate a traffic stop.

The Ninth Circuit has recently explained factual considerations that may be considered in determining the totality of circumstances for border patrol stops that may justify a brief investigatory stop. These include "(1) characteristics of the area; (2) proximity to the border; (3) usual patterns of traffic and time of day; (4) previous alien or drug smuggling in the area; (5) behavior of the driver, including obvious attempts to evade officers; (6) appearance or behavior of passengers; (7) model and appearance of the vehicle; and, (8) officer experience." United States v. Berber-Tinoco, 510 F.3d 1083, 1087 (9th Cir. 2007) (quotations and citations omitted).

The two facts relied upon by Agent Shigg fall far short of any of the considerations detailed in Berber-Tinoco. Starting with the characteristics of the area, Mr. Guerrero was pulled over on Interstate 5 near San Clemente. There is nothing suspicious about this area and the agent himself reported nothing in the ROI that explained this area was notorious for alien smuggling. Looking at proximity to the border the stop occurred near San Clemente, more than 60 miles north of the international border with Mexico. There was nothing unusual about the time of day as Mr. Guerrero was arrested at 12:15 in the afternoon. Nothing about the traffic was suspicious nor was the Border Patrol Checkpoint in San Clemente open and operating at the time Mr. Guerrero was arrested. The agent reported nothing about Interstate 5 as being a notorious alien smuggling route. Importantly, nothing about the driving behavior of Mr. Guerrero would lead Agent Shigg to suspect criminal activity was occurring. Agent Shigg himself reports Mr. Guerrero was driving at the posted speed limit of 65 miles per hour at the time he was pulled over. Furthermore, Mr. Guerrero did not do anything suspicious with his driving at the time he was arrested. He did not accelerate, evade the agent, or swerve in and out of lanes. Instead, he was driving at the posted speed limit and pulled over immediately once Agent Shigg initiated his lights and siren.

Turning to the "appearance of behavior of the passengers," Agent Shigg explained that he observed two individuals in the back seat of the vehicle ducked down. The Ninth Circuit has cautioned courts not to accept "a prefabricated or recycled profile of suspicious behavior very likely to sweep many ordinary citizens into a generality of suspicious appearance merely on a hunch." Sigmond-Ballesteros, 285 F.3d at 1126. There are numerous reasonable legitimate reasons to have an individual duck down in a car: a person may be reaching for something, felt car sick or just felt more comfortable sitting that way. The fact that two individuals were ducked down cannot lead to a reasonable suspicion that criminal activity was occurring. Looking at the model and appearance of the car, Agent Shigg noted that the car appeared to be heavily loaded although only two passengers were observed. Yet the fact that Mr. Guerrero was driving a Mercury Mountaineer, a car designed to seat four passengers and has a rear cargo area designed to haul items is not a fact that leads to a reasonable articulable suspicion that criminal activity is occurring.

Based solely on these two facts, Agent Shigg initiated a traffic stop of Mr. Guerrero. Turning to the last Berber-Tinoco factor, officer experience, as Sigmond-Ballesteros explains "although law enforcement officials are entitled to assess the facts in light of their experience, experience may not be used to give the officers unbridled discretion in making a stop." Sigmond-Ballesteros, 285 F.3d at 1126-1127 (quoting Montero-Camargo, 208 F.3d at 1131) (quotations omitted). These two facts relied upon by Agent Shigg fall far short of the required reasonable articulable suspicion of criminal activity that the Constitution requires in order to conduct a traffic stop of a vehicle. It is unreasonable for an officer to believe that a car driving in the middle of the afternoon on a busy freeway far from the border and obeying the posted speed limit without driving in any unsafe or suspicious manner is likely engaging in criminal activity, specifically alien smuggling, on the sole basis that the car appears to be weighted down and there were two individuals who looked to be ducking in the back seat.

In fact, the facts here fall far short of those in Sigmond-Ballesteros, where the Ninth Circuit reversed the district court's finding that reasonable suspicion of criminal activity existed to justify a traffic stop. In that case, Border Patrol agents conducted a traffic stop suspecting the defendant was transporting illegal aliens for the following reasons: (1) the defendant changed lanes and moved off the main road when approached by the Border Patrol agents; (2) the defendant attempted to obscure his face to the agents with hand gestures; (3) the area the defendant was observed driving in was a route notorious for alien smuggling; (4) the defendant was driving a truck which is commonly used for alien smuggling; (5) the defendant was driving away from the border at a suspicious time of day, 4:20 a.m.; (6) the defendant was driving close to the border; and (7) the car was missing a rear seat. Sigmond-Ballesteros, 285 F.3d at 1122-1126. Looking at all these factors, the Court found the agents did not have a reasonable articulable suspicion that criminal activity was afoot.

As detailed above in more detail, there are less facts here than articulated in Sigmond-Ballesteros. As noted above, Mr. Guerrero did not change lanes and was obeying the posted speed limit. Mr. Guerrero did nothing to obscure himself from the agent and was not found driving in an area claimed to notorious for alien smuggling. Nothing about the car Mr. Guerrero was driving - a Mercury Mountaineer - would lead the agent to reasonably believe he was engaging in alien smuggling. Mr. Guerrero was nowhere close to the border, driving in San Clemente more than 60 miles north at a unsuspicious time of day, 12:15 p.m. The facts known to Agent Shigg at the time he stopped Mr. Guerrero could not have lead him to reasonably believe that criminal activity was occurring. The facts he articulated - a weighted down vehicle and two individuals ducking - describe any number of law abiding individuals in a populated area and a well-traveled highway. Therefore the stop was illegal and any evidence obtained as a result of that stop must be suppressed. See Wong Sun v. United States, 371 U.S. 471 (1963).

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III.

THIS COURT SHOULD CONDUCT AN EVIDENTIARY HEARING TO DETERMINE WHETHER MR. GUERRERO'S FOURTH AMENDMENT RIGHTS WERE VIOLATED

Because Mr. Guerrero's motion to suppress evidence necessitates this Court to make a factual determination, an evidentiary hearing is necessary to resolve the issues. Where a factual determination is required, Rule 12 of the Federal Rules of Criminal Procedure obligates courts to make factual findings. See United States v. Prieto-Villa, 910 F.2d 601, 606-10 (9th Cir. 1990). Because "'suppression hearings are often as important as the trial itself,'" these findings should be supported by evidence, not merely an unsubstantiated recitation of purported evidence in a prosecutor's responsive pleading. Id. at 610 (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)). Therefore this Court should hold an evidentiary hearing.

IV.

THIS COURT SHOULD ORDER THE GOVERNMENT TO PRESERVE THE CAR SEIZED IN THIS CASE AND ALLOW MR. GUERRERO AN OPPORTUNITY TO INSPECT THE VEHICLE BEFORE ANY EVIDENTIARY HEARING

Mr. Guerrero requests an order for the U.S. Government and its agents to preserve the vehicle in his case and allow him, through his attorney and investigator to view the vehicle. For the Court's convenience, a proposed order will be sent to chambers via electronic mail.

V.

CONCLUSION

For the foregoing reasons, Mr. Guerrero respectfully requests that the Court grant the above motions.

Respectfully submitted,

Dated: August 3, 2008

s/ Hanni M. Fakhoury
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